

12/2/77

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR

In the matter of)	
Buzz-Off Products, Inc.)	I.F. & R. Docket No. II-157C
Respondent)	Initial Decision

This is a proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), Section 14(a), 7 U.S.C. 136 1(a) (Supp V, 1975) for the assessment of civil penalties for holding for sale the product BUZZ-OFF ELECTRONIC MOSQUITO REPELLER, a device subject to FIFRA, which was misbranded. The complaint was issued on September 3, 1976, and proposed the assessment of a civil penalty of \$1,800.

The complaint charged that respondent's device was misbranded in that its labelling was false and misleading. Respondent answered denying that the product was a device and that its label was false and misleading and requesting a hearing. The parties then, at the direction of the Administrative Law Judge, exchanged information as to witnesses, proposed exhibits and certain other matters, as provided in Section 168.36 of the Rules of Practice for these proceedings, 40 CFR 168.36. Settlement was discussed; however, negotiations were dropped when respondent refused to furnish certain financial information.^{1/} The matter was then set down for a hearing on November 3, 1977, the parties were notified of the time and place, and the hearing was held as scheduled. Complainant appeared at the hearing, but respondent did not.

^{1/} Letter from EPA attorney Susan Levine to the Administrative Law Judge dated September 21, 1977, in the file in this case.

asserting that the issues in the proceeding were moot because Dynamic House, Tele House, Inc., "parent and alter-ego" of respondent has been adjudicated a bankrupt and respondent is no longer in business.

Administrative Law Judge Exhibit 3. The rules provide, in 40 CFR 168.20(b), that the failure of a respondent to appear at a hearing constitutes a waiver of its right to present evidence at the hearing, and that the Administrative Law Judge shall require the presentation by complainant of such evidence as the Administrative Law Judge deems necessary to develop a prima facie case against respondent. Complainant, accordingly, presented its prima facie case, and the hearing was closed. A copy of the transcript of the hearing was served upon respondent on November 9, 1977.

This initial decision is now being issued and in accordance with 40 C.F.R. 168.20, will be served upon respondent. In rendering this decision, the pleadings, and the information furnished by the parties pursuant to the prehearing exchange directed by the Administrative Law Judge have been considered, as well as the evidence presented at the hearing.

Findings of Fact

1. The respondent Buzz-Off Products, Inc., at all times mentioned herein maintained a place of business in New York, New York.
2. Respondent on or about August 13, 1977, held for sale the product known as a BUZZ-OFF ELECTRONIC MOSQUITO REPELLER.
3. The label on the product stated that the product was an "Electronic Mosquito Repeller."
4. Said product is a device within the meaning of FIFRA, Section 2(h), 7 U.S.C. 136(h).

5. Said device does not repel mosquitos. Tests conducted with the device disclosed that the device was ineffective in repelling mosquitos.

6. The device that respondent held for sale on or about August 13, 1976, was misbranded within the meaning of FIFRA, Section 2(q)(1), 7 U.S.C. 136(q)(1), in that the statement on the label that the device was a "mosquito repeller" was false and misleading.

7. The respondent violated FIFRA, Section 12(a)(1)(F), 7 U.S.C. 136j(a)(1)(F), in that it held for sale a device which was misbranded.

8. Taking into consideration the size of respondent's business, the effect on respondent's ability to continue in business and the gravity of the violation, it is determined that \$1,800 is an appropriate civil penalty for the violation found.

Discussion and Conclusions

In its answer and in its response to the Administrative Law Judge's prehearing direction for information, respondent has questioned only the claim that its product "Buzz-Off" is a device subject to FIFRA, and the amount of the proposed penalty.

FIFRA, Section 2(h) defines a device to include any "instrument or contrivance...which is intended for...repelling, or mitigating any pest...." Respondent's "Buzz-Off" product clearly fits this definition. The product is described on the label as an "electronic mosquito repeller" and that it is intended for repelling mosquitos cannot be seriously disputed. Mosquitos come within the definition of "pests" in the EPA's regulations for the enforcement of FIFRA, 40 C.F.R. 162.14.

Tests conducted by EPA demonstrated that the product does not repel mosquitos. Respondent was furnished with a copy of these tests in the prehearing exchange of information and has not questioned their accuracy.

The one claim which respondent has really pressed and which is the stated cause for respondent's not appearing at the hearing is the alleged insolvency of respondent. This claim is based on the adjudication in bankruptcy of the asserted "parent and alter-ego" of respondent, Dynamic House/Tele House, Inc. Complainant's counsel, however, examined the bankruptcy files for Dynamic House/Tele House, Inc., and spoke to the bankruptcy trustee from the New York Credit Men's Adjustment Bureau, Inc., and has been unable to ascertain from either source that respondent is, in fact, involved in the bankruptcy proceedings.^{2/} Although respondent would be the best source of evidence as to its own financial condition, respondent has consistently refused to provide any specific information about its current assets, liabilities, or gross sales for its most recent fiscal year.

The civil penalty proposed in the complaint to be assessed in the amount of \$1,800 is derived from the EPA's Guidelines for the Assessment of Civil Penalties under FIFRA, 39 Fed. Reg. 27711 (July 31, 1974).^{3/} In determining the actual penalty, however, consideration

^{2/} Transcript of hearing at 4-6.

^{3/} Complainant's response to the Administrative Law Judge's direction for a prehearing exchange of information.

must be given to the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violation, FIFRA, Section 14(a).

The penalty was assessed on the basis of respondent's having gross sales for the prior fiscal year exceeding \$1 million (a category V violation). The guidelines provide, however, that the penalty is to be adjusted accordingly, if respondent presents reliable data that his business size is other than that employed by complainant in computing the proposed penalty, Section I D(2)(b), 39 Fed. Reg. at 27712, or that the proposed penalty will have a significant adverse effect upon respondent's ability to continue in business, Section I D(2)(c), 39 Fed. Reg. at 27712. As already noted, respondent has refused to present specific data about its financial condition and since this information is peculiarly within the knowledge of respondent, respondent's failure to produce justifies the conclusion that the information would have been adverse to respondent's contention that respondent has no assets. See Interstate Circuit, Inc. v. United States, 306 U.S. 208, 225-26 (1938); 40 C.F.R. 168.04(c)(4).

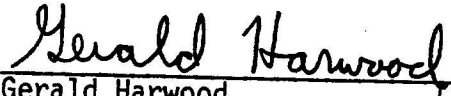
Assuming respondent has, in fact, discontinued business, as it claims, this would moot only the question of whether the penalty would affect respondent's ability to continue in business, but not necessarily the question of whether the proposed penalty may still not be appropriate in view of respondent's financial condition. To allow a respondent to escape liability by voluntarily discontinuing business would provide a convenient means for evading FIFRA.

The gravity of the violation I find to be sufficiently great to justify the requested penalty, in view of the worthlessness of the product to carry out its intended purpose of protecting persons from mosquito bites.

Accordingly, I propose that the following order be issued:

FINAL ORDER

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 1(a)(1) (Supp V, 1975), a civil penalty of \$1,800 is assessed against respondent Buzz-Off Products, Inc., for the violation established on the basis of the complaint issued on September 3, 1976.^{4/}


Gerald Harwood
Administrative Law Judge

December 2, 1977

^{4/} This order shall become the final order of the Regional Administrator unless an appeal is taken as provided in 40 C.F.R. 168.51, or the Regional Administrator elects on his own motion to review the initial decision. See 40 C.F.R. 168.46(c).